

Blueprint for a Loophole: *Cincinnati Enquirer v. Cincinnati Board of Education*

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I. INTRODUCTION

On June 22, 2011, the Ohio Supreme Court declined to hear the appeal in the case of *Cincinnati Enquirer v. Cincinnati Board of Education*.¹ The litigation resulted from a dispute between the Cincinnati Enquirer (Enquirer) and the Cincinnati Board of Education (Board) over a violation of the Ohio Open Meetings Act (Act).² By denying the Enquirer's appeal, the Ohio Supreme Court let stand the court of appeals decision that created a major loophole for public bodies to avoid the provisions of the Act and expanded an already questionable decision far beyond its proper scope.

II. THE OPEN MEETINGS ACT AND THE EXECUTIVE SESSIONS EXCEPTION

The Act serves as a critical check on Ohio's public bodies by requiring the vast majority of all official business to occur in plain sight. As the preamble to the Act states, the law "shall be liberally construed to require public officials to

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¹ 949 N.E.2d 1032 (Ohio Ct. App. 2011), *appeal denied*, 949 N.E.2d 44 (Ohio 2011) (table decision).

² OHIO REV. CODE ANN. § 121.22 (LexisNexis 2007).

take official action and to conduct all deliberations upon official business only in open meetings *unless the subject matter is specifically excepted by law*.³ In keeping with this broad mandate, the Act specifically delineates the exceptions for when public bodies can meet behind closed doors for those few instances when meetings legitimately need to take place in private.⁴

These exceptions have both a substantive and procedural component. Thus, the Act not only requires public officials to limit substantive discussion in executive sessions to permissible topics, but also requires that they abide by a set procedure when convening an executive session.

Substantively, public bodies may only convene these sessions to discuss one of seven subjects specifically set forth in the Act.⁵ For example, a public body may discuss “personnel matters” in executive session, but only if the discussion relates to the appointment, employment, dismissal, or discipline of a specific employee.⁶ A public body may also call an executive session to confer with its legal counsel but only if the subject matter is “pending or imminent court action.”⁷ The public body may do nothing more in executive session than discuss the permissible topic for which it convened the executive session.⁸ Furthermore, the public body may not vote in executive session.⁹ In short, the Act ensures that a closed-door session is very much the exception to the open meeting requirement.

Procedurally, the public body must convene the executive session properly by first setting forth the appropriate statutory purpose for the session. This is consistent with the notion that an executive session is a very limited exception to a general rule of openness. Thus, to convene an executive session, a quorum of the public body must entertain a motion to convene the executive session.¹⁰ That motion must set forth the specific, approved matter to be discussed.¹¹ In addition, the public body must conduct a roll call vote on the motion.¹² A public body that convenes an executive session without following these mandatory procedures violates the Act.

In short, a public body’s failure to satisfy *either* the substantive or the procedural requirement of the Act is a violation.

³ § 121.22(A) (emphasis added).

⁴ § 121.22(D).

⁵ § 121.22(G).

⁶ § 121.22(G)(1).

⁷ § 121.22(G)(3).

⁸ § 121.22(G).

⁹ § 121.22(H).

¹⁰ § 121.22(G).

¹¹ *Id.*

¹² *Id.*

III. *CINCINNATI ENQUIRER V. CINCINNATI BOARD OF EDUCATION*

A. *The Illegal Meeting*¹³

This *Enquirer* case stems from an Emergency Special Public Meeting called by the Cincinnati Board of Education on August 27, 2009. Earlier that week, Cincinnati City Council members Chris Bortz and Jeff Berding approached acting Board President Melanie Bates about whether the Board would consider a proposal to defer an annual payment the City owed the Board. Under an agreement related to public financing of the city's professional sports stadiums between the City and the Board, the City gave the Cincinnati School System \$2.5 million twice a year. By asking the Board to agree to a deferral of the payment, the Council members hoped to use the \$2.5 million to avoid police layoffs. The deferral proposal was a political hot button, characterized as a contest between "cops and kids."¹⁴ Moreover, Ms. Bates understood that the majority of the City Council had not endorsed the proposal. Despite this, she called an emergency Board meeting for August 27, to "discuss the issue of the proposed deferral of the payment."¹⁵

At the outset of the special meeting, Board member Catherine Ingram, who was facing a contested re-election that November, moved to assemble in an executive session in order to "conference with Board legal counsel regarding contractual issues." The motion was voted on and approved by a majority of the Board members. The private session lasted for nearly an hour. According to the testimony of Board members who were present, at least one Board member urged the Board to reject the City's proposal. Upon returning from the private session, however, Ms. Bates announced that the Board had decided to consider the proposal.

B. *The Trial Court Action*

The *Enquirer* immediately objected to this violation of the Act, and pursuant to the appropriate provisions of the Act, filed an injunction action in Hamilton County Common Pleas Court.¹⁶ Because there was no factual dispute concerning the Board's violation, the *Enquirer* filed a motion for summary judgment. The Hamilton County Court of Common Pleas granted the *Enquirer's* motion on the issue of the underlying violation.¹⁷ Noting that the statute

¹³ These facts are in the opinion, *Cincinnati Enquirer v. Cincinnati Board of Education*, No. A0909406 (Ct. Com. Pl. Apr. 23, 2010) (Entry Granting Plaintiff's Motion for Summary Judgment).

¹⁴ Jane Prendergast, *Council Proposal: Defer Payments to CPS*, CINCINNATI.COM (Aug. 27, 2009, 1:24 PM), <http://news.cincinnati.com/article/AB/20090827/NEWS0108/908270355/Council-proposal-Defer-payment-CPS>.

¹⁵ *Cincinnati Enquirer*, slip op. at 2.

¹⁶ § 121.22(I)(1).

¹⁷ *Cincinnati Enquirer*, slip op. at 10.

requires a liberal construction, the trial court ruled that the emergency meeting was a meeting under the plain language of the Act,¹⁸ which defines a meeting as “any prearranged discussion of the public business of the public body by a majority of its members.”¹⁹ Specifically, the court noted that Ms. Bates called the meeting, public notice was given, and a majority of the Board members attended.²⁰ But, because Ms. Ingram moved to enter executive session to “conference with Board counsel regarding contractual issues”²¹—a ground nowhere listed in the Act—the Board violated the Act.

Next, the court explained that even if the Board had properly called the session, there was no legitimate basis for the session with Board counsel because the proposed payment deferral did not rise to the level of imminent court action.²² Because the Board had not taken a formal litigative stance regarding the deferment, the court explained, there was no legitimate basis for entering an executive session to confer with counsel.²³ Thus, the trial court found that the Board violated the Act on both procedural and substantive grounds.

The trial court also rejected the Board’s argument that the executive session never amounted to a “meeting” because it consisted merely of an “information gathering” session with Board counsel.²⁴ The Board’s argument relied on the case of *Theile v. Harris*.²⁵ In *Theile*, three township trustees made an appointment with the county prosecutor for the sole purpose of having the prosecutor brief them on the legal consequences that would flow if the trustees decided to eliminate the township police department.²⁶ The “fact finding” session did not take place at a regularly scheduled trustees meeting, but rather took place in the prosecutor’s office.²⁷ The First District Court of Appeals in *Theile* found that the session did not constitute a “meeting” under the Act because the trustees did not deliberate, but merely listened to the information supplied by the prosecutor.²⁸

In the *Enquirer* case, the trial court distinguished *Theile*, noting that in this case:

Bates decided to call an emergency meeting, public notice was given, and a majority of the board members attended. . . . The Board discussed the deferral with each other, members of the public, and its legal counsel. Under the liberal

¹⁸ *Id.* slip op. at 6.

¹⁹ *Id.*; see also OHIO REV. CODE ANN. § 121.22(B)(2).

²⁰ *Cincinnati Enquirer*, slip op. at 6.

²¹ *Id.* slip op. at 3.

²² *Id.* slip op. at 8.

²³ *Id.* slip op. at 9.

²⁴ *Id.* slip op. at 5.

²⁵ No. C-860103, 1986 WL 6514 (Ohio Ct. App. June 11, 1986).

²⁶ *Id.* at *2.

²⁷ *Id.* at *6.

²⁸ *Id.*

construction that is intended for the [Act], this qualified as a meeting subject to the provisions of the [Act].²⁹

Although the trial court found that the Board violated the Act, it denied attorney's fees.³⁰ The Act provides in section 121.22(I)(2)(a)(i)–(ii) that attorney's fees may be reduced if the court determines that both of the following apply:

- (i) [B]ased on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed public body reasonably would believe that the public body was not violating or threatening to violate this section;
- (ii) That a well-informed public body reasonably would believe that the conduct or threatened conduct that was the basis of the injunction would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.³¹

Despite this plain statutory language, the trial court did not make such findings. Rather, the trial court summarily denied the Enquirer's Motion for Attorney Fees, asserting that the Board reasonably believed that its actions were not a violation of the Act and that the Board reasonably believed this session served the perceived public policy of the Act.³² The trial court provided no support for its sweeping assertions. Because the trial court failed to make the specific findings required by the statute, the Enquirer appealed the decision on the issue of attorney's fees. The Board appealed the trial court's finding that it violated the Act.

C. The Appeal

Upon appeal, the First District Court of Appeals reversed the trial court's finding on the issue of the violation.³³ The appellate court found that the Board members did not deliberate or have discussions at the session, so it was not a meeting as defined by the Act.³⁴ Thus, the court found the question of attorney's fees to be moot.³⁵

The Enquirer appealed this ruling to the Supreme Court of Ohio. The Enquirer urged that the Supreme Court should exercise jurisdiction over this case to clarify that a public body cannot cure a violation of the Act by its

²⁹ *Cincinnati Enquirer*, slip op. at 6.

³⁰ *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, No. A0909406 (Ct. Com. Pl. May 24, 2010) (Entry Denying Plaintiff's Motion for Attorney's Fees).

³¹ OHIO REV. CODE ANN. § 121.22(I)(2)(a)(i)–(ii) (LexisNexis 2007).

³² *Cincinnati Enquirer*, slip op. at 2.

³³ *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 949 N.E.2d 1032, 1036 (Ohio Ct. App. 2011).

³⁴ *Id.* at 1035–36.

³⁵ *Id.* at 1036.

subsequent conduct, and to limit *Theile* to its proper scope. However, the Supreme Court declined to exercise jurisdiction over this matter. In doing so, the Court grievously erred, for the reasons set forth below.

IV. DEFECTS IN THE HOLDING

The decision from the court of appeals is flawed for two reasons. First, it completely ignores the fact that the Board violated the Act the minute it entered the executive session on improper grounds, regardless of what occurred thereafter. By disregarding the explicit provisions of the Act, the decision inappropriately limited the specific protections the Act was designed to provide. Thus, the appellate court allowed the Board to “cure” a blatant violation of the Act, eviscerating the spirit and policy behind the rule.

Second, the court chose to ignore the obvious facts before it when it determined that no deliberations or decisions had taken place. A decision not to act should certainly be considered a decision, especially in light of the Act’s admonishment that “[t]his section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.”³⁶ Thus, the Ohio Supreme Court’s decision not to exercise jurisdiction over this case allows a flawed holding to stand—one that ignores both the letter and the spirit of the Act.

A. Procedural Defects of the Decision

The court of appeals decision (and by extension, the Supreme Court’s decision to decline jurisdiction) ignores the procedural flaws of the Board’s actions, going straight to a discussion of whether the session constituted a meeting. This is not a case where the procedure is meaningless. Rather, a specific procedure must be followed to effectuate the purposes of the Act. The appellate court’s decision completely ignores a long line of Ohio precedent that holds that a violation occurs as soon as a public body fails to set forth an appropriate statutory reason for the executive session.

Quite bluntly, these cases make sense. If public bodies can blatantly violate the specifically enumerated procedural requirements, why include them in the statute at all? Furthermore, the procedural requirement ensures that public bodies meet only for the reasons that the Ohio legislature deems appropriate for an executive session. For example, in *State ex rel. Long v. Council of Cardington*, the court concluded that a public body violated section 121.22 of the Ohio Revised Code by describing the reasons for an executive session in general terms, such as discussions of “personnel” and “finances” instead of one or more of the specified statutory purposes.³⁷ The *Long* court explained that a

³⁶ § 121.22(A).

³⁷ 748 N.E.2d 58, 63 (Ohio 2001).

public body's reiterating the laundry list of possible matters for discussion under section 121.22(G)(1), without specifying which of those purposes would be discussed in the executive session, was a violation.³⁸

Likewise, in *Jones v. Brookfield Township Trustees*, the court concluded that substantial compliance with the Act was insufficient to cure a statutory violation.³⁹ This case reversed a trial court's conclusion that because the session was held in the proper manner, this satisfied the notice requirement of the Act.⁴⁰ The court found that such a holding *directly* conflicted with the *exact wording* of the statute.⁴¹ Further, the court emphasized that in interpreting the notice section, the Ohio Attorney General noted that section 121.22 imposes additional requirements before a party can go into executive session.⁴² The Attorney General explained:

In effect, . . . R.C. 121.22 [imposes] three additional requirements before a public body may go into executive session. First, the vote to go into executive session must be by a majority roll call vote, rather than mere voice vote. Second, the public body must specify in both its motion and vote, which of the purposes listed in R.C. 121.22(G) the public body will discuss in executive session. *Finally, if the public body is going into executive session for the purpose of discussing one or more of the matters listed in R.C. 121.22(G)(1) concerning personnel, the public body must specify in its motion and vote, which of the particular matters listed in subdivision (G)(1) the public body will discuss.*⁴³

Additionally, the *Jones* court explained that a reference to "police personnel matters" was insufficient.⁴⁴ The court reasoned that if this reference alone could satisfy the notice requirement, a public body would never be required to identify any of the stated purposes prior to holding an executive session, which would, in turn, render the statute meaningless.⁴⁵

Here, the court of appeals skipped the crucial first step in the Act's analysis: namely, determining whether the session followed the procedural requirements set forth in the Act. By overturning the trial court's decision in the Enquirer's case, the court of appeals not only ignored the procedural requirements of the Act but also disregarded a long line of Ohio case law.⁴⁶ The proper procedure is

³⁸ *Id.*

³⁹ No. 92-T-4692, 1995 WL 411842, at *3 (Ohio Ct. App. June 30, 1995).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (citing Op. Ohio Att'y Gen. No. 88-029, at 15 (1988)).

⁴³ *Id.* (alteration in original) (omission in original) (citing Op. Ohio Att'y Gen. No. 88-029, at 15).

⁴⁴ *Id.*

⁴⁵ *Jones*, 1995 WL 411842, at *3.

⁴⁶ See *State ex rel. Long v. Council of Cardington*, 748 N.E.2d 58, 64 (Ohio 2001); *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 771 N.E.2d 263, 273, 275 (Ohio Ct. App. 2001) (holding that proper deliberations cannot cure the original violation); *Jones*,

not an optional requirement. It is critical to effectuate the purpose of the Act, which is to ensure that deliberations of Ohio's public bodies occur in public.

B. Substantive Defects of the Decision

The court of appeals ignored the facts at hand when it determined that no deliberations or discussions occurred during the Board's meeting. Board members asked questions of legal counsel during the session. Additionally, Board members who were deposed affirmed that during the executive session, at least one board member, Eve Bolton, urged the Board to reject the proposal without further negotiation. However, upon emerging from the session, Ms. Bates announced that the Board had decided that it would consider the proposal. Thus, it is clear that a decision was made—to consider the proposal.

Furthermore, the executive session took place during a formal meeting of a public body. The Board properly called for the "Emergency Special Public Meeting" in accordance with section 121.22 of the Ohio Revised Code. It designated the meeting as a *discussion* of evolving events regarding the stadium payment from the City of Cincinnati. Thus, the Board—by its own terms—agreed that the meeting was subject to the Act's requirements. It was only later that the Board changed its course and called it an "information gathering" session with counsel.⁴⁷

The facts presented establish that there was discussion and that deliberation occurred during the private session. Thus, the Board violated the Act not once, but twice. By failing to exercise its jurisdiction over this case, the Ohio Supreme Court permitted the Board to skirt two violations of the Act and created a major loophole for public bodies to avoid the provisions of the Act.

V. THIS RULING CREATES A MAJOR LOOPHOLE FOR PUBLIC BODIES, ALLOWING THEM TO SKIRT THE REQUIREMENTS OF THE OPEN MEETINGS ACT

By overturning the trial court decision, the court of appeals gave its stamp of approval to the Board's playing fast and loose with the Act. Ms. Ingram's motion to go into executive session stated that the purpose was to discuss the "contractual" issues surrounding the City's deferral proposal with the Board's attorney. Despite this initial position, the Board first defended the session by contending that it was a meeting with counsel to discuss pending or imminent court action. But, there was no pending or imminent court action by any fair use of those terms. Thus, the Board changed its course later to contend that the

1995 WL 411842, at *3; *Vermillion Teachers' Ass'n v. Vermillion Local Sch. Dist. Bd. of Educ.*, 648 N.E.2d 1384, 1389 (Ohio Ct. App. 1994) (explaining that a Board's argument that the substance of a procedure could cure a technical violation "misses the point").

⁴⁷ *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, No. A0909406, slip op. 2 (Ct. Com. Pl. Apr. 23, 2010) (Entry Granting Plaintiff's Motion for Summary Judgment).

session was merely for “fact finding” and, under *Theile*, should not be considered a meeting.

By allowing the Board to enter the session unlawfully, ruling that the Board did not come to a decision, and expanding the exception of *Theile v. Harris*, the court of appeals’ decision creates a major loophole that allows public bodies to avoid the scrutiny of the Act. Ultimately, it creates two defenses that public bodies can use to exploit the Act and avoid accountability to the public. These exceptions will also likely make it very difficult for the public to challenge violations of the Act.

The first allows a public body to skirt the Act by claiming that it reached no formal decision during the discussion, therefore rendering the discussion something other than a “meeting.” In so holding, the court relied on *Steingass Mechanical Contracting v. Warrensville Heights Board of Education*.⁴⁸ In *Steingass*, the low bidder on two renovation projects sought to enjoin a school board from awarding the contracts to other companies.⁴⁹ The low bidder claimed that the school board had violated the Act when it had convened an executive session to confer with counsel just prior to its vote.⁵⁰ The Eighth District Court of Appeals, however, ruled that because the executive session did not result in a “resolution, rule or formal action,” the Board did not violate the Act.⁵¹ In the *Enquirer* case, the court of appeals relied on *Steingass* to support its finding that the executive session did not violate the Act, because it resulted in no formal action.⁵²

But, the *Steingass* case is based on a faulty assumption—that a violation occurs only if “formal action” is adopted at the meeting.⁵³ Ohio courts have consistently rejected this notion, and it is most certainly contrary to the spirit and purpose of the Act.⁵⁴ As the court noted in *State ex rel. Schuette v. Liberty Township Board of Trustees*, “The Ohio Supreme Court has found it is not necessary for the board to reach a decision on any matter in order to prove a violation.”⁵⁵

⁴⁸ *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 949 N.E.2d 1032, 1035 (Ohio Ct. App. 2011) (citing *Steingass Mech. Contracting, Inc. v. Warrensville Heights Bd. of Educ.*, 784 N.E.2d 118 (Ohio Ct. App. 2003)).

⁴⁹ *Steingass*, 784 N.E.2d at 121.

⁵⁰ *Id.*

⁵¹ *Id.* at 126.

⁵² *Cincinnati Enquirer*, 949 N.E.2d at 1035–36.

⁵³ *Steingass*, 784 N.E.2d at 126.

⁵⁴ See *Berner v. Woods*, No. 07CA009132, 2007 WL 4146645, at *4 (Ohio Ct. App. Nov. 27, 2007); *Piekutowski v. S. Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 830 N.E.2d 423, 429 (Ohio Ct. App. 2005); *State ex rel. Schuette v. Liberty Twp. Bd. of Trs.*, No. 03-CAH-11064, 2004 WL 1879026, at *4 (Ohio Ct. App. Aug. 19, 2004); *Mansfield City Council v. Richland Cnty. Council AFL-CIO*, No. 03 CA 55, 2003 WL 23652878, at *4 (Ohio Ct. App. 2003).

⁵⁵ *Schuette*, 2004 WL 1879026, at *4 (citing *State ex rel. Delph v. Barr*, 541 N.E.2d 59 (Ohio 1989)).

The appellate court's holding also ignores several important facts, including the political climate at the time. At the time of this meeting, Ms. Ingram, the Board member who moved for the executive session, faced a contentious reelection battle. The question of the stadium tax deferment was a political land mine, framed as a choice between "cops and kids." So, Ms. Ingram avoided a public discussion of the issue by moving for an executive session on grounds not permitted by the Act: namely, to "conference with Board legal counsel regarding contractual issues."⁵⁶ By allowing the Board to play fast and loose with the Act's explicit requirements, the appellate court blessed the politically motivated actions of the Board.

The appellate court holding also ignores the fact that because the discussion occurs behind closed doors, anyone seeking to challenge the practice is forced to rely solely on the self-serving recollections of the public body. This hardly ensures the public accountability required by the Act.

The appellate court's reliance on *Theile* is equally troubling. The holding in *Theile*—that a fact finding session with counsel is not a meeting—has never been reviewed by the Ohio Supreme Court. It should be, because *Theile* undermines the very purpose of the Act. The Act explicitly addresses the circumstances that allow a public body to confer privately with counsel—*only* to discuss pending or imminent court action. To allow a public body to privately engage in a "fact finding" session with counsel on *any* topic, however, invites abuse.

Thus, the *Theile* holding is suspect on its own terms. But, applying its reasoning to the facts presented in the *Enquirer* case is even more illogical. Where the "fact finding" session occurs in the course of a public meeting, called for the purpose of discussing a specific issue, *Theile* has no application. Again, if the public body cannot justify the closed-door session based on the "executive session" categories set out in the Act, the *Theile* case should prove no cover. The potential for abuse is too great.

VI. THE ULTIMATE FAILING OF THE *CINCINNATI ENQUIRER* V. *CINCINNATI BOARD OF EDUCATION* DECISION

The Ohio Supreme Court's decision not to hear this appeal was short-sighted and will have a deleterious effect on the Ohio Open Meetings Act.

First, the decision by the court of appeals permits public bodies to cure a blatant violation of the Act by its subsequent conduct. The Act is clear that a public body commits a violation as soon as it enters an executive session for grounds other than those specified in the Act. This case vividly illustrates the problem. The Board convened a meeting, entered an executive session on illegal grounds, and then claimed that there were no discussions or deliberations during the session, so that it was not a meeting. This "duck and cover" tactic will allow

⁵⁶ *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, No. A0909406, slip op. 3 (Ct. Com. Pl. Apr. 23, 2010) (Entry Granting Plaintiff's Motion for Summary Judgment).

public bodies to convene an executive session illegally, and then cure such a violation based on its members' descriptions of what occurred behind closed doors.

The undisputed evidence in the case established that whatever "fact finding" occurred at the executive session, the Board members discussed the issue among themselves as well. The undisputed evidence also established that following the executive session, the acting Board president announced that based on the executive session discussions, the Board would listen to a proposal from the City. A decision to listen to a proposal is a decision.

Thus, for the appellate court to rule that the executive session was merely a passive fact finding session is to utterly ignore reality. And, to rule that a closed-door session that includes a briefing from counsel is not a "meeting" based on the presence of an attorney is to expand *Theile* to a degree that it will subsume the Act.

Thanks to the appellate court's flawed holding, all Ohio public bodies received a blueprint outlining how to conduct a politically charged discussion in private. First, make a motion to convene an executive session on whatever grounds it cares to invent. Second, invite counsel into the meeting. Third, when challenged, contend that no formal action was taken and that the session was merely a fact finding exercise with counsel.

The First District's failure to abide by the Act's admonition to interpret it broadly, coupled with the Ohio Supreme Court's inexplicable refusal to review the decision, resulted in a grievous limitation on the public's right to know.